Civil Law

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I. Swiss Civil Code

1. History

The first attempt to codify civil law in Switzerland was undertaken during the Helvetic Republic. However, with the decline of the Helvetic Republic in 1803, the work on a comprehensive Private Law Code ceased.

In the 19th century, most cantons adopted civil law legislation with the aim of ending legal fragmentation and to achieving legal certainty on a cantonal level. Whereas the French Code Civil of 1804 was used as a model for the (French and Italian speaking) cantons in western and southern Switzerland (Fribourg, Ticino, Vaud, Valais, Neuchâtel, and Geneva), other cantons (amongst others, Bern, Lucerne, Solothurn, and Aargau) based their legislation on the Austrian Civil Law Code. A third group of German-speaking cantons in central and eastern Switzerland managed to, by and large, remain uninfluenced by foreign legislators in their enactment of comprehensive civil law legislation (for instance Zurich). Finally, a last group of central cantons (inter alia, Uri, Schwyz, Glarus, and Appenzell) completely abstained from enacting any comprehensive civil law legislation.[1]

One influential cantonal codification during this period was that made on behalf of the canton of Zurich by Johann Caspar Bluntschli, a legal scholar and professor of law in Zurich, Munich, and Heidelberg. He drafted Switzerland's first independently codified cantonal civil code which entered into force in 1856. Bluntschli's work was well-recognised both nationally and internationally and it served as a model for the later codification and harmonisation of Swiss civil law on the federal level.

1 Peter Tuor/Bernhard Schnyder/Jörg Schmid/Alexandra Jungo, Das Schweizerische Zivilgesetzbuch, 14th edition, Zurich 2015, § 1 n. 2 et seqq.

Figure 1: Johann Caspar Bluntschli (1808–1881)[2]

However, the Swiss civil law landscape was to remain heterogeneous throughout the second half of the 19th century. Due to their extensive autonomy, the 25 cantons[3] (i.e. federal states) retained their legislative independence leading to a variety of civil codes, while there was a total lack of legislation in some cantons. As such, significantly different legal principles in the field of civil law could be applied to different cases depending on the canton at issue. In the 1860s, in the context of this complex landscape, the Swiss Lawyers' Association called for a unified civil code at the federal level. However, the first attempt to provide the federal legislator with the competence to enact such a code was rejected by both the people and the cantons in 1872, although shortly thereafter, a limited federal competence to pass the federal Code of Obligations of 14 June 1881 was accepted by the people and the cantons.[4] Finally, in 1898 the people and the cantons transferred the (non-exclusive) competence regarding civil law matters to the federal legislator.

2 Source: Wikipedia, with reference to: Reproduction from Zurich – Geschichte Kultur Wirtschaft. Gebrüder Fretz, Zurich 1932 (https://perma.cc/5KNN-XFGQ).

3 Today, there are 26 cantons within the Swiss confederation. This has been the case since 1979 when the canton of Jura seceded from the canton of Bern by popular vote.

4 As a matter of substantive law, the Code of Obligations – although adopted earlier – is the fifth part of the Civil Code. However, the Code of Obligations formally and in terms of general use is considered a distinct codification with a separate Article numbering.

2. Legislation

The Federal Council mandated Eugen Huber, a professor of state law, private law and legal history at the Universities of Basel, Halle, and Bern, to draw up a comparative compendium of all existing cantonal civil codes. From 1886 until 1893,[5] Huber published his comparative analysis in four separate volumes.

Figure 2: Eugen Huber (1849–1923)[6]

Following the comparative analysis, Huber published the first draft of the Civil Code in 1900. Until 1904, a commission of experts deliberated on the draft. Finally, on 10 December 1907, the Code was adopted by the Federal Assembly: It officially came into force on 1 January 1912.

Therefore, this chapter does not address the Code of Obligations and its underlying principles (for details on the Code of Obligations see the Chapter Law of Obligations, pp. 305).

5 Notably, Huber's assistance was mandated several years before the referendum in 1898 took place which granted the federal legislator the competence to codify civil law. This was also the situation with the Criminal Code: although the assistance of Carl Stooss was mandated in 1892, the legislative competence was not granted to the federation until 1898. The most probable explanation behind this is that the Federal Council was fairly confident that the referendum would pass and was merely a formality; thus they wanted to push the project immediately; see for details on the Criminal Code the Chapter on Criminal Law, pp. 369.

6 Source: Wikipedia (https://perma.cc/EQ7T-E2UV).

3. Content[7]

The Civil Code is comprised of 977 Articles. It also contains, in a "*final title*", 251 commencement and implementing provisions which, inter alia, regulate the transitional relationship between this federal Code and its cantonal predecessors.

After the ten introductory Articles which contain general principles of Swiss law (application of the law, good faith, relationship between federal and cantonal law, and rules of evidence), the Civil Code is divided into four parts.

Part 1 (Articles 11–89c) covers the *Law of Persons* and mainly regulates the legal personality of natural and legal persons, legal capacity as well as the protection of legal personality in case of infringements. It also addresses the issue of the registration of civil status. Another focus of Part 1 is legal persons. The general provisions of Articles 52–59 contain fundamental principles that are universally applicable to all legal persons under Swiss law (such as the separate legal personality of legal persons, their capacity to act and to acquire rights and obligations, their seat, and rules pertaining to their dissolution), while Articles 60–79 specifically address associations and Articles 80–89a deal with foundations. The last two Articles (Articles 89b and 89c) are dedicated to so-called collective assets – i.e. funds raised by way of a public collection for charitable purposes – where no arrangements have been made with regards to the management or use of such funds.

Part 2 is dedicated to *Family Law* (Articles 90–456). It addresses the marital law and the marital property law. Although Swiss law does not (yet) allow for same-sex marriages, since 2007 the registered partnership between persons of the same sex is regulated in a separate federal law. The family law also contains provisions on kinship and, inter alia, regulates the parent-child relationship. An entire section (Articles 360–456) sets out measures for the protection of adults (including measures for legally incompetent persons and the deputyship) and introduces the instruments of the health care proxy and the living will into Swiss civil law.[8]

Part 3 of the Civil Code (Articles 457–640) deals with the *Law of Succession* and is subdivided into provisions relating to heirs, testamentary freedom and

7 In the following text, where Articles are mentioned without referencing their source of law, they are located in the Swiss Civil Code of 10 December 1907, SR 210; see for an English version of the Civil Code www.admin.ch (https://perma.cc/DV8N-FFT2).

8 The rules pertaining to the protection of minors and adults, which completely overhauled the former custodianship law, entered into force on 1 January 2013.

testamentary dispositions, executors, the commencement and legal effects of succession as well as the division of the estate.

Part 4 (Articles 641–977) focuses on *Property Law*. It contains rules regarding ownership in general, land ownership, and ownership of chattel. Part 4 also regulates limited rights *in rem* (e.g. *usufruct* and other personal servitudes, right of residence and building rights), charges on immovable property (mortgages and mortgage certificates as personal obligations), and charges on chattel (such as pledges and liens). Swiss property law also contains rules on possession, including the legal definition of possession, rules pertaining to the transfer of possession, and legal remedies in case of interference. The final provisions of Part 4 cover formal and material aspects of the land register.

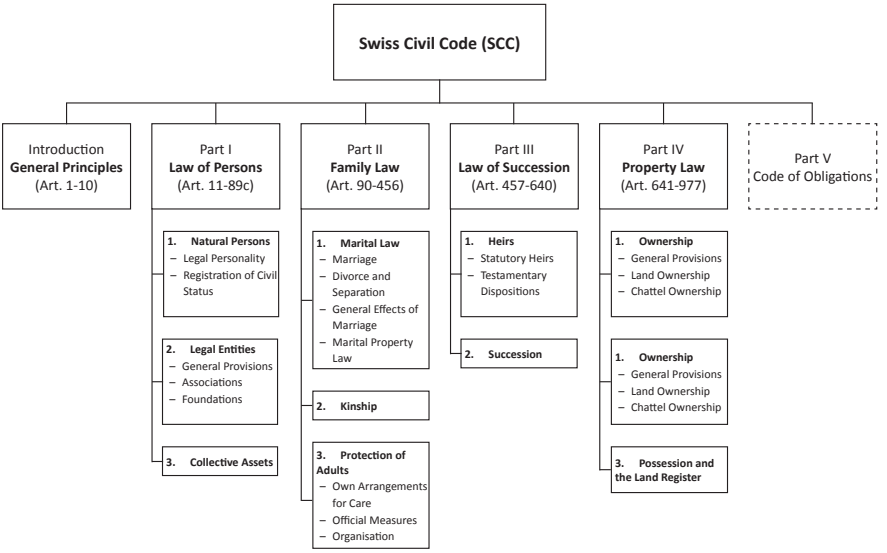

Figure 3: Structure of the Civil Code

4. Marital Property Law

Swiss family law establishes three marital property regimes to govern the ownership of the property: (i) the marital property regime of participation in acquired property (*Errungenschaftsbeteiligung*), (ii) the community of property (*Gütergemeinschaft*), and (iii) the separation of property (*Gütertrennung*). As participation in acquired property constitutes the default,

it applies if the spouses do not choose a different regime by marital agreement (either by way of a prenuptial agreement prior to marriage/civil union or by a contract amending an existing matrimonial property regime following marriage/civil union).

The marital property regime of participation in acquired property (Articles 196–220) distinguishes property acquired during the marriage from the individual property belonging to each individual spouse. Consequently, two different types of property can be distinguished, namely the individual assets of the spouses/registered partners and the assets they acquired during the marriage or registered partnership.[9]

The *acquired property* under this regime comprises the assets which a spouse acquired for valuable consideration during the marital property regime, in particular:

- proceeds from employment (e.g. salaries);
- benefits received from staff welfare schemes, social security, and social welfare institutions;
- compensation for inability to work;
- income derived from individual property; and
- property acquired to replace or substitute acquired assets.

By operation of law (Article 197), a spouse's *individual property* comprises:

- personal belongings used exclusively by that spouse (e.g. jewellery, musical instruments, etc.);
- assets belonging to one spouse as well as donated and inherited property;
- claims for satisfaction; and
- acquisitions substituting or replacing individual assets.

The marital property regime is dissolved (i) through divorce, (ii) on the death of a spouse, or (iii) on the implementation of a different regime. In the case of dissolution of the marital property regime of participation in acquired

9 By default, registered partners live under the property regime of separation of property, see Article 18 of the Federal Act on Registered Partnership for Same Sex Couples of 18 June 2004, SR. 211.231. However, registered partners can opt-in and declare applicable the principles of the regime of participation in acquired property, by way of a property agreement.

property, each spouse (or, in case of dissolution upon death, his/her heirs) keeps his or her *individual* property and the spouses (or the surviving spouse with the deceased spouse's heirs) settle their debts to one another. The distribution of the property which was acquired during the marriage depends on the surplus or deficit of each spouse's *acquired* property, whereby each spouse is entitled to one-half of the surplus of the other spouse.

The marital property regime of *community of property* comprises two types of property: the individual assets of each spouse and the common assets of the couple. If the community of property regime is dissolved by the death of a spouse or the implementation of a different marital property regime, each party is entitled to one-half of the common assets and may keep his or her own individual assets.

Finally, in the *separation of property* regime only one type of property exists, namely the individual property of each spouse. Each spouse, within the limits of the law, administers and enjoys the benefits of his or her individual property. If the regime of separation of property is dissolved, each spouse is entitled to his or her individual property.

5. Prohibition of Maintenance Foundations and Fee Tails

Article 335 I establishes that assets may be tied to a family by means of a family foundation created under the Law of Persons or Inheritance Law (see Article 80 I) to meet the costs of raising, endowing or supporting family members, or for other "*similar purposes*". However, the establishment of (new) fee tails (*Fideikommiss*) is explicitly prohibited (Article 335 II, Article 488 II).[10] This prohibition of fee tails aims at preventing the preservation and accumulation of wealth in dynastic family structures.

The Federal Supreme Court follows a strict interpretation of the phrase "*similar purposes*" contained in Article 335. In a key ruling it held that the establishment of family foundations for maintenance purposes

10 Fee tails in civil law jurisdictions were a way of connecting assets to a certain family over generations by bequeathing them from father to, traditionally, eldest son thereby, preventing desegregation of the family assets (e.g. lands, castles, etc.). Nowadays common-law trusts and, in some jurisdictions, family foundations can serve similar purposes.

(*Unterhaltsstiftungen*) is not permissible.[11] However, considering the historic will of the legislator at the time of the Civil Code's enactment, this ruling was neither imperative nor convincing in the light of modern foundation law developments and the generally liberal approach of the Swiss civil law. Perhaps indicating a shift towards a less strict approach, the Federal Supreme Court held in 2009 that Article 335 is not to be considered a so-called *loi d'application immédiate* preventing the legal recognition of maintenance foundations established under foreign law.[12]

6. Inheritance Law

As a consequence of the freedom to dispose of one's property as one sees fit *inter vivos* (Article 641), Swiss inheritance law stipulates the freedom to pass on wealth at death through the means of a will (Article 470 I). Within the *numerus clausus* of types of testamentary dispositions, the testator may, in principle, freely allocate his property after his death (Article 481 I). The Civil Code stipulates testaments and contracts of succession as the two main types of wills. If the testator decides not to make a will, the Civil Code designates his offspring, spouse, and other family members as statutory heirs who are eligible for a certain quota of the estate (Articles 457–466).

Pursuant to Article 542, an heir must be alive and capable of inheriting at the time of succession. While natural persons can inherit both as statutory and testamentary heirs, legal persons can only be appointed as heirs by way of a testamentary disposition. In certain constellations (for example if a person wilfully and unlawfully caused or attempted to cause the death of the decedent) a person will be regarded as unworthy (i.e. incapable) of inheriting thus excluding such person as statutory and/or testamentary heir (Articles 540 et seq.). By operation of law the excluded person's issue inherit from the deceased as if the person unworthy to inherit had predeceased the deceased.

Unless the testator has – legitimately – deprived an heir of his or her statutory heirship by way of disinheritance (Articles 477 et seqq., for example where the heir has committed a serious crime against the testator or a person close to the testator), the freedom to make a will is significantly limited by

11 BGE 71 I 265.

12 BGE 135 III 614.

Switzerland's restrictive regime of *forced shares*. Under this regime, only the "*disposable part*" of a testator's assets can be passed-on at his or her discretion (Article 470 I), while a substantial quota of the testator's assets is available to the testator's offspring, spouse, and parents (again, unless the testator can disinherit one or more of the aforementioned persons).[13] This is a statutory entitlement. Moreover, the statutory heirs do not simply receive the right to make a claim for payment against the testator's estate; they become heirs *ex lege*. Finally, to protect against the possibility of the testator abusively evading the heir's statutory rights *inter vivos*, the testator's freedom to dispose of his or her assets *inter vivos* is limited by the possibility of an abatement of such transactions after his or her death (Article 527).

Example: At the time of his death the testator, whose spouse had died a couple of years earlier, leaves a daughter and assets of around CHF 1 million. The testator who had always lived with an attitude *"to leave the world a better place"* had, over a period of three years prior to his death, made various donations of CHF 9 million in total to a charitable institution. In his testament the testator has appointed his daughter as sole heiress. Although the daughter had, from a formal point of view, been appointed as sole heiress, the *inter-vivos*-donations substantially undermine her compulsory share. Without the deceased's donations the estate would have amounted to CHF 10 million and the daughter would, from a legal point of view, have been entitled to a compulsory portion of ¾ of the estate (Article 471 I), i.e. CHF 7.5 million. However, in economic terms she only gets CHF 1 million under the testament. According to Article 527 III gifts made in the last five years before the deceased's death are subject to abatement. As a result, the daughter can demand CHF 6.5 million from the donee (i.e. the charitable institution) to fully restore her compulsory portion of the heritage.

Another key characteristic of Swiss inheritance law is the principle of *eo ipso* acquisition of an estate through universal succession (Article 560). Upon the death of the deceased, the estate in its entirety vests *ex lege* in the heirs. According to the *eo ipso* acquisition, the heirs acquire all of the deceased's assets and debts automatically and without a requirement for any formal act from the heirs and/or any administrative or judicial body. As a result of the *principle of universal succession* the deceased's claims, rights of ownership, limited rights *in rem,* and rights of possession automatically pass to the heirs

13 Currently, a draft legislation proposes abolishing the compulsory portion of the parents and reducing the offspring's compulsory portion from ¾ to ½ of their statutory share.

while the debts of the deceased become the personal debts of the heirs. The principle applies to both statutory and testamentary heirs. In order to protect heirs from receiving unwanted or over-indebted/insolvent estates, every heir has the right to renounce the inheritance within three months after he/she learned of the death of the deceased (Article 567). In addition, there is a legal presumption in favour of renunciation in case of insolvent estates (Article 566).

II. Principles

1. Application and Interpretation of the Law

According to Article 1, which addresses the relationship between statutory law and judicial power, the law must be applied by the courts to all legal questions it provides an answer to, by directly applying its wording or by interpreting its terms. However, in the absence of an applicable provision, a court shall decide in accordance with customary law and, in the absence of customary law, in accordance with the rule that it would establish itself if it were the legislator. When applying and interpreting the law, the court shall follow established doctrine and tradition.

Article 1 can be regarded as the civil law's expression of the constitutionally protected and fundamental principle of the *rule of law* (*Rechtsstaatlichkeitsgrundsatz*) in the following ways. Firstly, it provides for the *separation of powers* by requiring a court to apply the law in cases where it is applicable. The legislator passes laws as abstract and general rules; thus it is for the courts to concretely apply the law in each individual case. Secondly, Article 1 dictates that, when interpreting the law, the courts must follow established *methodology*. Although the reference to doctrine and tradition in Article 1 is not exhaustive, this reference does explicitly identify established doctrine and case law as two relevant considerations of methodological interpretation in the process of finding justice.[14] Thirdly, Article 1 contains the *prohibition of arbitrary decisions*. In cases where the legislator has not passed any legislation, the courts cannot simply decide the case as they see fit. Instead, this provision stipulates a process according to which a court must resort to customary (e.g. local or professional) laws, if available. If neither explicit nor customary laws exist, the court must put itself in the shoes of the legislature and establish a rule that could serve as a general statutory law-provision. Even

14 "*Tradition*" within the meaning of Article 1 includes established case law as well as established administrative practice, see Tuor/Schnyder/Schmid, § 5 n. 37 et seqq.

in this scenario, the court is not permitted unfettered discretion. By dictating that the court must "*act as legislator*", Article 1 demands a structured approach, and thereby subtly yet effectively reminds courts of the fundamental principles of the rule of law – such as proportionality and legal equality.

Whilst interpreting the law, the Federal Supreme Court utilises the following *common legal interpretation methods*:

- *grammatical interpretation* relying on the wording, syntax, and linguistic usage of the relevant text thereby giving words their literal, usual, and grammatical meaning;
- *systematic interpretation* by contextualising a provision within the overall legal and statutory framework;
- *teleological interpretation* which involves a consideration of the purpose and rationale (*telos*) of a certain provision;
- *realistic interpretation* which demands that the result of an interpretation must also consider questions of practicability;
- *historic interpretation* considering either the legislator's original will or relying on a more flexible historic intention, which may take into account later developments; and
- *constitutional interpretation* requiring courts to choose an interpretation that is best in line with the fundamental values enshrined in the Swiss Constitution.[15]

It should be noted that there is no hierarchy between these methods of interpretation; no method has greater importance or is accorded greater weight than the others. Instead, the Federal Supreme Court employs a "pragmatic" *pluralism of methods*. According to this approach, the law must primarily be interpreted integrally: its wording, meaning, and purpose as well as its underlying values and inherent rationale all must be part of the consideration. The interpretation must not be solely based on the wording of the provision. Instead, the relevant rule must be considered within the context of the law in a broader sense, and as something which can only be properly understood and concretised when confronted with the facts of an individual case. In this way, the rule ultimately comes to life through interpretation.[16]

15 BGE 106 Ia 33.

16 BGE 136 III 23, consideration 6.6.2.1.

This pragmatic approach is being criticised in the legal doctrine. On closer examination, it can very well be argued that the Federal Supreme Court simply wants to keep the door open for any future interpretation of a certain law. Whether such blurring of boundaries between the different interpretation methods is strengthening legal certainty, is, however, highly doubtful. In addition, it becomes more difficult to draw the line between admissible further development of the law through judicial decisions (e.g. to close a legal loophole) and inadmissible judicial legislation.

2. Good Faith

Another fundamental principle of Swiss civil law is enshrined in Article 2: every person must act in good faith when exercising his or her rights or fulfilling his or her obligations. Further, this provision clarifies that the manifest abuse of a right is not protected by law. The general *principle of good faith* is not limited to civil law, but is universally applicable and has validity in all aspects of Swiss law.[17]

This general rule of good faith (*bona fide*) can be divided into two sub-principles:

(i) the principle of *mutual respect and consideration* when exercising rights and fulfilling legal obligations; and
(ii) the prohibition of *abuse of rights*.

The principle of good faith requires that the parties to a legal relationship (regardless of whether the basis of the relationship is the law or a contract) act in an appropriate and honest manner, remaining loyal to their legal obligations. In this regard, Article 2 codifies and channels universal moral and philosophical ideas of integrity into the civil law.[18]

17 BGE 83 II 345: "*Article 2 of the Civil Code contains a general rule which applies in addition to individual legal norms, and which claims validity also outside the scope of federal civil law, e.g. in cantonal procedural law* [...]."; see also the Chapter on Administrative Law, p. 200.

18 Hence, it is not surprising that the sub-principle of mutual respect has, in fact, a lot in common with Immanuel Kant's categorical imperative: "*Act only according to that maxim whereby you can, at the same time, will that it should become a universal law*", Immanuel Kant, Groundwork of the Metaphysics of Morals, in Immanuel Kant, Practical Philosophy, The Cambridge Edition of the Works of Immanuel Kant, translated and edited by Mary J. Gregor, Cambridge 2008, pp. 37.

The principle of good faith reveals an important facet of Swiss civil law: Article 2 is the gateway and focal point for legal interpretation of, among others, contracts, actions, etc., and, where necessary, the creation of amendments or supplements to legal declarations of intention. Declarations of intention (such as declarations aiming at the conclusion of a contract), which are unclear, vague, or ambiguous and thus open to various interpretations, will be interpreted in accordance with the so-called *principle of trust* (*Vertrauensprinzip*).[19] This principle mandates that in cases where the true intention of the declaring party cannot be unequivocally established, the declaration will be interpreted as the receiving party, in good faith, could and should have understood it.

Other facets of the principle of good faith are the rule against unusual clauses (*Ungewöhnlichkeitsregel*) and the ambiguity rule (*Unklarheitenregel*). In particular, in the context of general terms and conditions (GTCs), where an unusual or surprising wording was implemented without this being explicitly notified, it will not be considered binding on the weaker or less experienced party. Furthermore, ambiguous wording will be interpreted by the court to the detriment of the author of such a clause.

The *prohibition of the abuse of rights* allows Swiss courts to rectify or prevent a result which, although correct from a purely formalistic legal point of view, would be ethically and morally questionable. It leaves room for correcting or preventing unbearable consequences which might otherwise undermine the trust of the people in the legal system's ability to provide fair and reasonable (and morally understandable) results.[20] According to established case law of the Federal Supreme Court of Switzerland a blatant abuse of the law will not be granted legal protection (Article 2 II).[21] Whether an exercise of rights is abusive must be determined in light of all the facts and circumstances of the individual case. Case-law has established certain types of conduct which will be considered abusive such as, amongst others, the exercise of a right which

19 This applies to declarations of intention to be received by the other party (*empfangsbedürftige Willenserklärungen*). In case of a *unilateral* declaration of intention, which does not need to be received by another party to become legally binding (e.g. testament), the Federal Supreme Court applies the so-called *principle of intent* (*Willenstheorie*) according to which only the true and real intention of the declaring party is relevant (and not the interpretation of a hypothetical and [quasi-] objective receiving third party) – as long as the interpretation result can be reconciled with the wording of the declaration.

20 BGE 125 III 257, consideration 2 a.

21 Among others, Judgement of the Federal Supreme Court 4A_141/2008 of 8 December 2009.

is not justified by any legitimate interest, the misuse of a legal institution for inappropriate interests or the contradictory use of rights in a manner that violates valid expectations based on prior conduct. However, Article 2 II is to be applied restrictively and only where the results of strictly applying the law would be severely unjust.

Example: With the aim of reducing taxes and duties, the seller and buyer of a building plot decide to formally reduce the official purchase price in the notarial deed of sale from CHF 6 million to CHF 5 million. However, they agree that the buyer shall pay the seller the difference in cash. If the buyer, upon signing of the notarial deed of sale, refuses to pay the additional CHF 1 million, the seller cannot claim invalidity of the notarised purchase agreement in order to get back ownership of the building plot in return for refund of the purchase price. Although, from a formal point of view, the notarised purchase agreement would be deemed invalid because it did not contain the correct purchase price and, therefore, does not fulfil the requirement that the *entire* agreement regarding the sale of land requires the notarial form, such approach could promote illicit behaviour of colluding parties and undermine the trust of the general public. Therefore, Article 2 II prohibits the seller from invoking the invalidity argument.[22]

One important group of cases revolves around the argument of *venire contra factum proprium* whereby the contradictory conduct of one party is sanctioned if the other party, based on the previous conduct (either by action or omission) of the former, could reasonably expect a different behaviour and has made (financial) arrangements (e.g. investments) as a result of his or her expectations.

Example: Company X (a limited liability company, *GmbH*) has rented business premises from company Y (a company limited by shares, *AG*) for a fixed period of ten years. According to the rental agreement, the parties agreed to start negotiating the terms and conditions of a contract renewal three months prior to the end of the ten-year period. During the negotiations the CEO of company Y repeatedly stated both verbally and in various e-mails that the

22 Interestingly, in similar cases (BGE 92 II 323 and BGE 104 II 99) the Federal Court declined to set Article 2 II aside on the basis that the other party had willfully colluded in such illicit conduct. Instead, the court emphasised that the legal situation created by the parties as a result of the notarised deed of sale (i.e. the transfer of ownership and the changes registered in the land register) justified rejecting the formally correct argument of invalidity in order to uphold the public reliance and faith with regards to entries in the land register.

lessor wanted to sign a new rental agreement (substantially in line with the previous one which allowed the tenant to modify the premises according to the tenant's needs) with company X "*because of the great personal and business relationship*" between the two parties.

Against this background and expecting to stay in the business premises for another five to ten years, company X started to make substantial renovations and modifications in the rented space. During this time the parties negotiated the terms of a new contract. Company Y CEO has frequently visited the rented premises where he complimented Company X on the construction works.

However, on the day of the official expiry of the old rental agreement and with only minor issues left to negotiate, the CEO of company Y suddenly sent an e-mail to company X stating that *"as you are aware, the rental agreement is expiring today"* and demanded from company X to *"remove any installations and to make sure to hand over the premises in the original condition by 5.00 pm today at the latest"*.

In this case company X could, based on the CEO's behaviour, reasonably expect to sign a new rental agreement which would also allow the tenant to make renovations and modifications to the rented premises. By repeatedly signalling to company X during the negotiations, on the one hand, that a contract renewal could be expected and, on the other hand, by abruptly abandoning the negotiations, CEO of company Y has acted in a contradictory manner.

As a result and based on Article 2 II, Y can neither claim that the original rental agreement expired nor demand that company X hand over the business premises in the original condition.

3. Publicity, Possession, and Land Register

Property law allocates property by conferring rights *in rem* (or real rights) (*dingliche Rechte*)[23], which have legal effect not only between the parties of a contract or other bilateral legal relationship (*inter partes*), but which can be enforced against everyone (*erga omnes*).[24] To make it easy for any interested (third) party to ascertain the existence or non-existence of such real rights, Swiss property law upholds the *principle of publicity* (*Publizitätsprinzip*),

23 A real right (or right in rem) is a right attached to a movable or immovable property instead of a person.

24 E.g. such as ownership as a real right, conferring absolute freedom within the limits of the law (Article 641 I) and the right to make a claim of ownership against everyone (Article 641 II).

according to which rights *in rem* must be made public through suitable means.[25]

With regard to movable property, it is possession (*Besitz*), i.e. effective control (Article 919 I), that grants publicity. Accordingly, to validly transfer ownership the new owner must legitimately gain possession (*traditio*) of the chattel (*Traditionsprinzip*, Article 714 I).[26]

There are, however, different forms of possession under Swiss law which may result in different legal remedies being available for the different categories of possessors. First, more than one person is able to possess the same chattel at the same time (*multiple possession*). Thus, effective control can be exercised directly (*immediate possession*) or indirectly via another person (*indirect possession*). Secondly, whoever exercises effective control as if he were the owner of the property has *direct possession*, while someone who exercises effective control based on an obligatory right or a limited right *in rem* has *derivative possession* (Article 920). Thirdly, possession (and also ownership) can be transferred without the need to physically exchange the object of possession (Article 924).

Example: A has borrowed a book from his friend B until the end of the semester (loan for use pursuant to Article 305 of the Swiss Code of Obligations).[27] Under Swiss law, B can sell his book to C while A may continue keeping and using the book. In this case B would need to inform A about the sale of the book and instruct him to hand it over to C at the end of the semester. Following the sale, B has transferred his indirect possession (and, since there is no direct/indirect ownership, full ownership) to C by way of an instruction pursuant to Article 924 (*Besitzanweisung*). A remains the immediate or direct possessor of the book and is entitled to refuse delivery of the book to C based on the same arguments he/she could have invoked against B under the loan for use (C may, therefore, not demand that A deliver the book to C during the semester).

25 Tuor/Schnyder/Schmid, § 88 n. 9. For a discussion of the principle of publicity under English law, see Wolfgang Faber/Brigitta Lurger (eds.), National Reports on the Transfer of Movables in Europe, Vol. 6, The Netherlands, Switzerland, Czech Republic, Slovakia, Malta, Latvia, in European Legal Studies, Vol. 15, Munich 2011, p. 167.

26 Therefore, possession is a fact and not a right.

27 Federal Act on the Amendment of the Swiss Civil Code of 30 March 1911 (Part Five: The Code of Obligations), SR 220; see for the English version of the Code of Obligations www.admin.ch (https://perma.cc/AJ2U-V3MB).

Since possession usually reveals the existence of real rights on the chattel,[28] the possessor has an interest in excluding third parties from illegitimately exercising control over the chattel. Therefore, the Civil Code stipulates the *action for restitution based on possession* (Article 927) in the event of a wrongful dispossession by any third party.[29] Additionally, anyone who has a better *right* to possess the chattel (as opposed to possession as such) can utilise the *action for restitution based on a right to possession* (Articles 934 and 936).

Example: After B had sold the book to C, fellow student D stole the book from A who was learning in the library. A (and, for that matter, also C as indirect possessor) could demand restitution of possession based on Article 936 since D was acting in bad faith when obtaining direct possession.

However, if the current possessor took possession in good faith[30] in the case of a chattel which was lost by the previous possessor, the latter must reclaim possession within a five year period from the moment the chattel was lost (Article 934). In order to protect the public faith in certain transactions and business practices, Article 934 II stipulates that whenever a chattel has been sold at a public auction, or on the market, or by a merchant dealing in goods of the same kind, it may be reclaimed from the first and any subsequent bona fide purchaser only against reimbursement of the price paid.

If D immediately after he had stolen the book sells it to E, who acted in good faith when purchasing the book, A and C have five years to reclaim their possession from E. Assuming that D is neither a merchant nor sold the book to E on the market, E cannot demand any reimbursement from A or C. Should A and/or C fail to reclaim possession (and, in case of C, also ownership) within the five year-period, E acquires not only possession, but also ownership (!) based on Article 714 II in conjunction with Article 934 even though D as thief was neither authorised to transfer possession nor ownership. Consequently, after five years E becomes the sole possessor and sole owner of the book if he or she acted in good faith.

Further, the previous possessor is not permitted to reclaim possession at all if he or she had knowingly and willingly entrusted the chattel to another person, who then transferred the property to a third party (Article 933).

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28 As a consequence, Article 930 I stipulates a presumption of ownership for the (direct) possessor of the chattel.

29 Immediately after becoming aware of the dispossession and the identity of the offender, but no later than one year after the dispossession occurred (Article 929).

30 See pp. 285.

Thus, in our example neither A nor C could reclaim (direct or indirect) possession based on Article 936 if the book had not been stolen, but if A had instead given it to D as a gift. In this case D, if acting in good faith, is protected both with regards to possession and ownership since the chain of possession had not been broken by way of an unwanted loss or theft.

While a possessor may only invoke an action for restitution of possession based on Article 934 (against a possessor acting in good faith) or Article 936 (against any possessor acting in bad faith), the owner can, additionally, reclaim his or her possession through an *action for restitution based on ownership* (Article 641 II). Unlike the provision in Article 934, there is no specific time limitation period for an action based on Article 641 II, but property ownership needs to be proven.

In the case of immovable property, any disposition, change of ownership, or the creation or cancellation of as well as any amendments to real rights and obligations must be recorded in the land register to have legal effect. The expectation that the land register and its entries are accurate is guaranteed by law under the principle of good faith (Articles 971–974).

Swiss contract law is characterised by the far-reaching autonomy of the contracting parties. In this area, the law only defines certain boundaries (e.g. protection of the typically weak); otherwise it allows the parties to autonomously create and define the scope of rights and obligations which their legal arrangement will encompass. In property law, on the other hand, contracting parties' autonomy is much more limited. Since rights *in rem* take effect *erga omnes*, it must be easy for any third party to ascertain their scope. Therefore, Swiss property law follows a strict *principle of numerus clausus* of rights in rem.[31]

The principle of *numerus clausus* regarding rights *in rem* means that parties can select only from a given set of rights when they want to establish or modify a right *in rem* (in particular by way of contract). In this regard it is important to point out that possession in Swiss civil law does not constitute a right *in rem*. However, possession does indicate who has actual control over an asset and thereby ensures adherence to the principle of publicity and protects good faith.

In addition to ownership (*Eigentum*), Swiss property law only encompasses the following rights *in rem*:

31 The numerus clausus principle means that there is only a limited number of property rights available to the parties. As a consequence, parties are not entitled to create "new" property rights by deviating from the catalogue of real rights provided by Swiss property law.

- easement (both on property and limited personal easement);
- *usufruct*; and
- lien (including charges on chattels, charges on immovable property such as mortgages, special liens, and liens on debts).

4. Rules of Evidence

When the Civil Code came into effect in 1912, the federal legislator lacked the competence to legislate on matters of civil procedural law.[32] However, it was deemed necessary that the Civil Code should address certain procedural issues relating to evidence which could not be separated from the substantive civil law. Thus, certain civil procedural matters are covered in this legislation.

One such rule is contained in Article 8: unless the law provides otherwise, the *burden of proof* for establishing an alleged fact shall rest on the person who would derive rights from that fact. Consequently, the party asserting a claim is obligated to prove the legally relevant facts giving rise to and substantiating the claim.[33] Conversely, the party arguing that a claim is unsubstantiated or unenforceable bears the burden to prove the legally relevant facts that make the claim unenforceable (e.g. the argument that the applicable limitation period has lapsed or that the claimant had granted the defendant a deferral).

Further, the legislator of the Civil Code foresaw potential evidence-related problems with regard to good faith if the party invoking or relying on *bona fide* would have to prove its very existence. Therefore, Article 3 makes it clear that where the law makes legal effect conditional on a person's good faith, there shall be a *presumption of good faith*. However, according to Article 3 II, a person cannot invoke the presumption of good faith if he or she has failed to exercise the diligence required by the circumstances of the relevant case.

To illustrate this point: A, who is a car dealer, is offered a brand new "Race Car Deluxe Limited Edition" by B. B, who had stolen the car a couple of days earlier, is asking for a purchase price of CHF 30'000. The car in its current condition is being sold to customers at a market value of CHF 50'000, while

32 As a matter of fact, only since a referendum in 2000 does the competence for procedural law lie with the federal legislator resulting in the Swiss Code of Civil Procedure of 19 December 2008, SR 272. For details on Swiss Procedural Law, see the Chapter on Civil Procedure, pp. 333; see for an English version of the Civil Procedure Code www.admin.ch (https://perma.cc/7MVG-YPQF).

33 Tuor/Schnyder/Schmid, § 7 n. 7.

the dealer price paid by professional car dealers is approximately CHF 40'000. In such a case the low price asked by B should alarm A. Since the car is being offered to him 40 % below fair market value and still 25 % off the regular dealer price, A could not claim he acted in good faith. Instead, a court would argue that he failed to exercise proper diligence when acquiring the car and, as a consequence, A would be treated as mala fide (bad faith) possessor.[34]

5. Presumed Capacity of Judgement

Under Swiss law, in order for one's actions to create legal effect, one must have capacity of judgement. According to Article 16, a person is capable of exercising judgement within the meaning of the law if he or she does not lack the capacity to act rationally by virtue of being below a certain age or because of mental disability, mental disorder, intoxication, or due to other similar circumstances. The capacity of judgment is not determined abstractly, but in light of each legal transaction or event taking place. For instance, Article 94 requires prospective spouses to be at least 18 years old and to have capacity of judgement. In this case it is (only) relevant to ascertain that the prospective spouses are mentally capable to understand the general concept of marriage and to make such decision based on their own free will. In other words, for the question of capacity of judgement *in relation to a prospective marriage* it is irrelevant whether or not one of the prospective spouses would also be capable of concluding a complex legal contract.

According to the general rule of evidence (Article 8), the party invoking incapacity of judgement as an argument for or against a claim would, in principle, have to prove this circumstance. However, *capacity of judgement* is presumed under Swiss civil law. Consequently, a party does not have to prove that he or she was capable of judgement. As a result, when entering into a contract, parties can assume that the other party is legally capable. This presumption cannot be rebutted easily or prematurely. Even in cases involving a person who constantly brings suits, the presumption cannot be easily rebutted. As the Federal Supreme Court held, not everyone who tries to enforce his/her alleged rights in a stubborn manner with all possible means, and occasionally even disregards norms of common decency, can be automatically regarded

34 For a similar case see BGE 107 II 41; see also BGE 113 II 397 where the court held that car dealers are subject to a higher standard of due care and diligence in the context of purchases and sales of cars compared to other persons.

as a psychopathic grumbler (*psychopathischer Querulant*) who is incapable of judgement – even if he or she overstretches the patience of courts and authorities.[35]

It should be pointed out that doctrine and case law seem to be moving towards a less extreme approach to the presumption of capacity of judgement. In a case from 2004, the Federal Supreme Court was confronted with the following facts: In 1985 and thus at the age of 85, E, who had no close relatives at that time, had drawn up a notarised testament in favour of C and a local Swiss community (B). From 1988 onwards E needed intensive care and nursing in her home. At the instigation of the competent guardianship authority, A started taking care of E in July 1988 and both women developed a close personal relationship. In September 1988, E, accompanied by A, drew up a new notarised testament revoking all prior testamentary dispositions and appointing A as E's sole heiress. Shortly afterwards E died. Upon E's demise, B and C brought forward an action for annulment arguing that E had not acted with capacity of judgment when drawing up the second testament. The Federal Supreme Court upheld the lower courts' decisions and, effectively, declared void the second testament. The Court held that the presumption of capacity of judgement cannot be invoked (i.e. the person concerned is regarded as lacking capacity of judgement) if the person concerned, according to his or her general constitution, must normally and in all probability be regarded as incapable of exercising judgment. Based on the facts of the case the court found that a reduction of the standard of evidence applies and that, as a consequence, the burden of proof shifts to the person arguing in favour of capacity of judgement. Following such a shift of the burden of proof, the party confronted with a claim of incapability of judgement may, according to the court, bring forward all facts and arguments in support of his/her position by providing *full proof* of capability of judgement.[36]

However, this decision raises two questions: Firstly, how can someone provide full proof of capability of judgement, in particular in cases where the person concerned has already died? Secondly, in an ageing society one must be careful not to jump to the conclusion that older people from a certain age onwards or with a certain health condition (What age/health conditions exactly?) are, in essence, generally presumed to lack capacity of

35 BGE 98 Ia 324, consideration 3.

36 Judgment of the Federal Supreme Court 5C.33/2004 of 6 October 2004 (in particular, considerations 3.1. and 3.2).

judgement – thereby shifting the burden of proof to the older and more vulnerable members of society. Hence, it will be interesting to see how Swiss courts will decide in the future in potentially less obvious cases than the one described above.

6. Separation Principle

Part 1 of the Civil Code regulates the legal personality of legal persons in Switzerland. In Swiss law, so-called legal persons (*juristische Personen*) possess all the same rights and duties as natural persons, except for those which presuppose intrinsically human attributes, such as gender, age, or kinship (Article 53).

The decision to grant legal persons legal capacity and hence the ability to possess rights and be subjected to obligations, raises questions regarding (i) the internal relationship between the legal person and its owners, founders, or members and (ii) the external relationship of the legal person vis-à-vis third parties. In this regard, Swiss civil law follows the so-called *separation principle* (*Trennungsprinzip*), a fundamental rule of Swiss civil law in general and the Law of Persons in particular.

Under the separation principle, a legal person is separated both in legal and economic terms from its members, owners, or founders. In other words, the legal person itself is not just the sum of its members, owners, or founders; instead, it carries out its own activities and participates independently in economic and legal transactions. Hence, the legal person, and not the natural persons behind it, is the sole owner of its assets and the sole debtor of its obligations. Consequently, the members, owners (i.e. shareholders), or founders are neither entitled to the legal person's assets nor liable to third parties for its debts.[37]

37 Of course, shareholders are entitled to a company's profits by way of dividends. However, shareholders cannot simply demand that a certain asset (e.g. real estate), belonging to the company be gifted to them (this would also be considered a breach of the fiduciary duties of the company's board of directors).

III. Landmark Cases

The Federal Supreme Court (*Bundesgericht*) in Lausanne is the highest court in Switzerland and also the highest instance court for civil cases. Parties may only appeal to the Federal Supreme Court if they have exhausted all other procedures before hierarchically lower courts. When considering civil law matters, the main task of the Federal Supreme Court is to secure the consistent application of Swiss civil law throughout Switzerland. However, the Federal Supreme Court does not engage in reassessing the substance of a case or hearing new facts. Instead, it focuses only on whether the law has been correctly applied and interpreted.

1. Legacy Hunter[38]

In 2006 the Federal Supreme Court was given the (rare) opportunity (i) to shed light on the question whether a duty to inform can be derived from the general principle of good faith according to Article 2 I and (ii) to elaborate on grounds for unworthiness to inherit pursuant to Article 540.

E was born on 7 February 1907. She married an industrialist from Dresden. The marriage remained childless. A few years after the death of her husband, E relocated to and settled in Basel. She lived in her own flat, independently and without need for nursing care. On the 8 or 9 December 1993, E fell heavily in her apartment where she laid on the ground for a while without care or help. Following her accident, E (hereinafter: testator) was admitted to a nursing home 1993 where she died on 9 July 1995.

K (hereinafter: plaintiff) comes from a family that belonged to the circle of friends or acquaintances of the testator. According to a will dated 31 August 1987, the testator appointed K as sole heir. In a supplement to that will, the testator confirmed K's position as sole heir on the 10 March 1991.

B (hereinafter: defendant) acted as the testator's lawyer from 1991 until, presumably, her death. According to the facts the Federal Supreme Court was

38 BGE 132 III 305.

bound by, the defendant has been the lawyer of the testator since 1991 and has also discussed hereditary issues with her. When asked about her wishes regarding her estate, the testator replied to the defendant with the words: *"That's you."* During a visit at the nursing home, the defendant was informed by the testator in April 1994 about her will and that she had appointed the defendant as her sole heir. The defendant took this testament dated 2 December 1993 with him when he left the testator.

In addition to the relationship of trust as the testator's nominated lawyer, the defendant exercised great personal influence over the testator. The testator has not only been in a relationship of trust with the defendant, but continued to be in an actual relationship of dependency. With constant gifts the testator wanted to gain and maintain the friendship and affection of the defendant. The defendant was almost the sole reference person of the testator. The testator assumed that the defendant's consideration towards her was the result of genuine friendship and affection, and in this light she appointed the defendant as her sole heir. The defendant, on the other hand, did not act on the basis of friendship, but wanted to enrich himself. As the courts held, the defendant's true intentions have remained hidden from the testator.

In a handwritten will dated 16 November 1992 or 1993 (the exact year could not be determined), the testator appointed the defendant as her sole heir and executor and instructed him to pay out a certain sum as a legacy (*Vermächtnis*) to the plaintiff. In a testament dated 2 December 1993, the testator confirmed the defendant as sole heir and executor, but this time she did not include in the new will the legacy in favour of the plaintiff. Finally, in a letter to the defendant dated 25 February 1995, the testator revoked all previous testamentary dispositions and instructions, with the exception of those in favour of the defendant.

The plaintiff challenged the defendant's appointment as the sole heir and executor of the testator and, inter alia, brought an action seeking annulment of the testament dated 2 December 1993, stating that the defendant was unworthy to inherit and thus incapable to act as executor. The civil court of Basel-Stadt declared the last will of 2 December 1993 invalid. The appellate court of the canton of Basel-Stadt came to the contrary conclusion that the last will of 2 December 1993 was valid. However, the appellate court ultimately allowed the claim and found that the defendant was unworthy to inherit and incapable of exercising the office of executor.

With his appeal, the defendant requested to be, essentially, reinstated as executor and declared sole heir of the testator. The appeal was dismissed by the Federal Supreme Court.

With regards to the unworthiness of the defendant to inherit, the Federal Supreme Court had to answer the question whether the defendant, as the lawyer of the testator, had been under the duty to inform her about his conflict of interest (as lawyer and presumed sole heir) and, as a result, had maliciously prevented the testator from making a new and/or revoking the existing (last) will.

Firstly, the court held that the malicious act or omission pursuant to Article 540 I No 3 does not require that a criminal act had been committed. Secondly, the court confirmed the view that there must be a causal relationship between the malicious act or omission and the fact that the decedent did not make or revoke a will. In cases of a potential failure to provide advice and information, the hypothetical causality must be analysed. In other words, one must ask whether – based on an ordinary course of events and the general experience of life – a testator would have made, amended, or revoked a testament had he or she been informed in a proper manner.

The court then turned to the question whether the defendant was under a legal obligation to inform the testator about his true intentions which were not based on genuine friendship and about the conflict of interest arising from his simultaneous position as the testator's appointed sole heir and lawyer. The court repeated that from 1991 until her death the defendant was the only reference person for the testator. From the testator's perspective, this was much more than a working or purely professional relationship. Against this background, the court relied on the principle of good faith (Article 2) requiring parties to a legal relationship to act in an appropriate and honest manner. By not informing the testator about his true – i.e. purely economic – intentions and the conflict of interest as the testator's appointed heir and lawyer, the defendant had caused the testator to believe that they had a genuine friendship. Against this background the testator kept the defendant as the sole heir and executor until her death. Interestingly, the court did see that the testator, from a legal point of view, could have amended or revoked her last will and/or made a new testament at any time. However, it emphasised that the testator had relied on the (wrong) assumption that she and the defendant shared a friendship which made her believe there was no need to revoke her will or to make a new one.

In the eyes of the court, the defendant's failure to inform the testator about his true intentions as well as of his conflict of interest qualified as a grave misconduct on his part resulting in his unworthiness to inherit and to act as executor.

2. Capacity to Marry[39]

In this case the Federal Supreme Court was given the opportunity to examine the significance, meaning, and implications of the capacity of judgment (Article 16) in the context of a (prospective) marriage.

P, born in 1951 and E, born in 1934, had lived together since 1979 and in that year the couple initiated the formal preparatory procedure with the aim to marry (Article 97 I).[40]

During the preparatory procedure, P's mother, siblings, and in-laws spoke out against the marriage and, ultimately, brought forward an application to prohibit the prospective marriage. They claimed that P was mentally disabled and thus lacked capacity of judgement with regards to the prospective marriage.

Based on three court appointed experts' opinions, the court of first instance came to the conclusion that P's mental deficiency was in the border area between debility and imbecility. However, the court of first instance held that neither the couple's own interests nor those of other persons exclude the prospective marriage. It stated that marrying E was evidently in P's interest since she could remain in her familiar environment. P, who was pregnant at that time, was from a medical point of view also not in danger of passing on her mental condition onto her offspring, thereby rendering moot this (ethically very weak, to say the least) line of argument. As the court, dismissing the claim brought forward by P's family, said: *"Since P* [...] *could expect some help from E* [...] *in fulfilling her duties as a housewife and mother and since the simple, nature-loving life on the farm as well as the harmony between* [*the couple*] *could compensate for some educational shortcomings, it cannot be said that the child's interests* [...] *necessarily preclude the marriage*." P's family appealed this decision to the Higher Court, but to no avail. With their appeal to the Federal Supreme Court the claimants essentially repeated their arguments presented to the lower courts.

With regard to the capacity to marry (Article 97 I), the Federal Supreme Court had to decide whether P should be regarded as having capacity of

39 BGE 109 II 273.

40 In a nutshell, the aim of the preparatory procedure is to give the civil register the opportunity to assure itself that the marriage requirements are met (inter alia, that no fake marriage takes place, that the prospective spouses are not already married to other persons, and that the spouses are capable of marrying).

judgement pursuant to Article 16. Agreeing with the lower courts, it held that the (in-)capacity of judgement cannot be determined, once and for all, in an abstract manner without regard to the specific circumstances of each individual case.

The Federal Supreme Court held that, as far as the capacity to marry is concerned, one must (only) determine whether the fiancées have the mental maturity to enter into marriage with the concrete partner and whether they are capable of understanding the concept and meaning of a marriage and the mutual obligations resulting from it. Interestingly, the court continues by stating that the requirements regarding the capacity of judgement in the context of marrying are higher compared to the capacity of judgement in business or commercial dealings. At the same time, however, the requirements must not be so high to effectively render meaningless marriage as a constitutionally guaranteed right for too large a part of the population.

In its decision the Federal Supreme Court recalled that the reason for the requirement of Article 97 I was to prevent from the very beginning (dysfunctional) marriages which can never result in a true communion between two people. In addition, this provision wishes to protect the mentally incapable weak(er) person from being at the mercy of his or her spouse.

However, in a case like the present, capacity of judgement can be affirmed if the marriage is only beneficial for the mentally disabled person. By repeating the facts determined by the lower courts, the Federal Supreme Court found that a marriage with E was in the best interest of P and that she was to be considered as having capacity of judgement to enter into the marriage according to Article 97 I.

3. Footman with Samovar[41]

In a landmark case involving a famous artwork, the Federal Supreme Court clarified its view with regard to claims for restitution based on possession (Articles 934 and 936) and the relevant question of good or bad faith of the current possessor in light of Article 3.

In 1989, Mr. Werner Merzbacher, an important private collector of contemporary art, acquired for just over $ 1 million the painting "Footman

41 BGE 139 III 305; the details, including the names of the parties involved, are publicly known.

with Samovar" which was painted in 1914 by the Russian artist Kasimir Sewerinowitsch Malewitsch, one of the most prominent representatives of the so-called Cubo-Futurism school. The sale had been executed on a commission basis by a gallery in Geneva, with the seller remaining anonymous.[42]

Prior to the acquisition, Mr. Merzbacher had consulted with an expert who had confirmed the authenticity of the artwork. However, the expert had also, at this point, informed Mr. Merzbacher about rumours which were circulating in the art world claiming that a stolen artwork from Malewitsch was apparently on the market. Consequently, Mr. Merzbacher initiated extensive investigations regarding the "Footman with Samovar" and contacted organisations including Interpol about the matter. These investigations yielded no results.

In 2004, a Russian art collector filed a lawsuit against Mr. Merzbacher for restitution of possession based on Articles 934 and 936 (basically arguing that Mr. Merzbacher was not a bona fide possessor, but had acted in bad faith when acquiring the artwork). He claimed that the "Footman with Samovar" had been stolen from the private collection of his parents in 1978, and argued that this was a fact that Mr. Merzbacher both could have and ought to have known.

Both the District Court of Meilen as the court of first instance and the High Court of the Canton of Zurich as the second instance dismissed the case. They took the view that Mr. Merzbacher neither had nor ought to have had knowledge of the theft of the painting and, therefore, bona fide could be assumed based on Article 3 I. The lower courts held that Mr. Merzbacher had exercised proper and due diligence because he had initiated investigations prior to making the purchase.

The Federal Supreme Court, however, set aside the decision and remitted the case to the High Court of the Canton of Zurich. In particular, the Federal Supreme Court held that Mr. Merzbacher should have conducted more detailed investigations and that, therefore, the presumption of bona fide does not apply in the current case. The court, having regard to Article 3 II, pointed out that the art expert had informed Mr. Merzbacher about a concrete rumour indicating that "Footman with Samovar" might have been stolen. This was a clear warning sign considering that paintings from Malewitsch have only very rarely been put on the market for sale in the relevant period. In

42 The details and facts of this complex case are contained in the decision CG040012 of the District Court of Meilen of 21 December 2010.

the court's own words, *"[i]t is sufficient that at the time, from an objective point of view, the consultation of one or more experts would have been a suitable (if not the most appropriate) and reasonable measure to find out more about this rumour and any defects or limitations of the right of disposal on the part of the seller."*

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